IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 748.

THE NORTH ARLINGTON NATIONAL BANK,
Petitioner,

vs.

KEARNY FEDERAL SAVINGS AND LOAN ASSOCIATION,
Respondent.

BRIEF OF NEW JERSEY BANKERS' ASSOCIATION *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

This brief is filed with the written consent of the parties which has been filed with the Clerk.

Statement.

The New Jersey Bankers' Association is an association of national banks, New Jersey banks, and New Jersey mutual savings banks. There are in New Jersey 344 such banks, of which 337 are members of this Association. The total amount of deposits in all these banks is approximately five and one-half billions.

Reasons for Granting the Writ.

1. The lower court has decided an important question of federal law which has not been, but should be, settled by this Court.

2. The lower court has decided a federal question in a way probably in conflict with an applicable decision of this Court.

The court below held that the Home Owners' Loan Act of 1933 permitted a federal savings and loan association organized under its provisions to open a branch office. Savings and loan associations are financial institutions carrying on a business which, in some respects, is similar to the business of a savings or a commercial bank. There is direct competition among them.

The right of a New Jersey bank or of a national bank doing business in New Jersey to open a branch or branches is restricted territorially under the New Jersey statute and the National Banking Act. (See N. J. R. S. 17:9A-19 and 12 U. S. C. A. 36.) It is of extreme importance to the banking system of the State of New Jersey that it be regulated on a sound and conservative basis. To make it possible for federal savings and loan associations to establish branches indiscriminately throughout the State in a manner not permitted to national banks and New Jersey banks would open the door to unfair competition.

Financial businesses such as those carried on by banks and savings and loan associations are *quasi* public. The ordinary business may be established in New Jersey without any official consent, but a bank may be established only with the approval of the Comptroller of the Currency or the New Jersey Banking Commissioner as the case may

be. (See N. J. R. S. 17:9A-9, 10 and 11.) This is for the express purpose of permitting the establishment of banks or branches only where there is a need and not in such numbers in any given community such that competition among them will tend to lead to unsound banking practices. The public's money is deposited in the banks and the public welfare depends greatly upon the soundness of the financial institutions.

The court below held that the Home Owners' Loan Act of 1933 authorized the establishment of a branch for a federal savings and loan association, notwithstanding the fact that there is no provision in the statute authorizing or regulating the establishment of branches. Whether this decision is sound should be passed upon by this Court in the public interest.

In the case of *First National Bank of St. Louis* v. *Missouri*, 263 U. S. 640, 68 L. Ed. 486, this Court held that under the National Banking Act, a national bank had no power to establish a branch office, since that power was not expressly granted by the Act. While there are, of course, some differences between that case and this, nevertheless the decision below would appear to be in conflict with the decision of this Court in the cited case.

For these reasons we submit that the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF THE STATE OF NEW JERSEY.

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BRIEF AMICUS CURIAE ON BEHALF OF THE STATE OF NEW JERSEY.

STATEMENT OF FACTS.

The Kearny Federal Savings and Loan Association was chartered by the Federal Home Loan Bank Board on March 13, 1941, under provisions of the Home Owners' Loan Act of 1933 (12 U. S. C. A. 1461, et seq.). Previously it had been state chartered and known as Kearny Savings and Loan Association of Arlington, New Jersey. It was originally incorporated as a building and loan association in 1884, and there were merged into it, prior to 1941, three other state chartered associations. It converted to a federal charter in 1941. Its office location under state and federal charter is in the Town of Kearny, County of Hudson and State of New Jersey.

On or about March 1, 1949, the Home Loan Bank Board, successor to the Federal Home Loan Bank Board, over the written objection of the Department of Banking and Insurance of the State of New Jersey, granted permission to the Kearny Federal Savings and Loan Association to operate a branch office at a location in the Borough of North Arlington, County of Bergen and State of New Jersey.

The establishment of this branch office was the first action of its kind in New Jersey by the Home Loan Bank Board or by its predecessor Board, the Federal Home Loan Bank Board, since 1933, the year of the Board's inception.

PURPOSE OF BRIEF AMICUS CURIAE BY THE STATE OF NEW JERSEY.

This brief is filed in support of the application for a writ of certiorari by the petitioner so that the Court will be cognizant of the reasons why the State of New Jersey objected and still objects to the grant of the branch office by the Home Loan Bank Board, whose authority we respectfully urge, can rise no higher than the statute under which it was created and by virtue of which it functions.

ARGUMENT.

POINT I.

There is no authority in law for the branch office granted by the Home Loan Bank Board.

We search in vain for any authority in the federal statutes for the creation of branch offices for federal savings and loan associations.

Section 5 of the Home Owners' Loan Act of 1933 (12 U. S. C. A. 1464) as amended and supplemented, is the statutory authority upon which the Home Loan Bank Board must rely to justify its grant of the branch in question.

We quote the provisions thereof which we deem pertinent to this argument:

> "Sec. 5(a). In order to provide local mutual thrift institutions in which the people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations,' and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.
>
> * * * * * * * *
>
> "(c) Such associations shall lend their funds only on the security of their shares or on the security of first liens upon homes or combination of homes and business property within fifty miles of their home office: * * * *
>
> "(d) The Board shall have full power to provide in the rules and regulations herein authorized for the reorganization, consolidation, merger, or liquidation of such associations, including the power to appoint a conservator, etc. * * * * *"

It is our contention that nowhere in section 5 (supra) or elsewhere has the Home Loan Bank Board been given the statutory power to entertain applications for or to grant branch offices to federal savings and loan associations, and that such power may not be read into that section by implication or otherwise.

POINT II.

The Home Loan Bank Board has no power to promulgate rules or regulations relative to branches in the absence of statutory authority for their creation.

Rules and Regulations have been promulgated, repealed and revised from time to time since 1933 by the Home Loan Bank Board and its predecessor Board pursuant to the powers given to it by section 5 (above) of the Home Owners' Loan Act of 1933 (12 U. S. C. A. 1464). Among such regulations have been sections providing for and permitting branch offices for federal savings and loan associations under certain conditions and subject to certain controls. Those sections are presently 145.13 and 145.14 of the "Rules and Regulations for the Federal Savings and Loan System," Chapter 1(c) 24, of the Code of Federal Regulations.

It is our contention in this regard that the power of the Home Loan Bank Board to promulgate rules and regulations on any matter pertaining to the operations of a federal savings and loan association can rise no higher than statutory delegation of such power to it. We search in vain for such delegation to the Board and conclude therefore that the effort of the Home Loan Bank Board and its predecessor Board to rule or regulate on the subject of branch offices for federal savings and loan associations is without authority in law, and hence, its rules and regulations on branches are null and void and an unlawful usurpation of a legislative function by an administrative tribunal.

POINT III.

The New Jersey law as affecting State chartered savings and loan associations.

The 1946 Legislature of the State of New Jersey enacted a complete revision of the statutes affecting the organization, operation, etc., of savings and loan associations chartered to do business in New Jersey. It is Chapter 56, Laws of 1946. (Chapter 12A of Title 17 of Revised Statutes of New Jersey.) It was in preparation for a number of years

and reflects the concerted efforts of the industry through the New Jersey Savings and Loan League and the executive and legislative branches of the New Jersey State Government.

Section 21 of that revision is the New Jersey law and reflects its present policy relative to branches. It reads as follows:

> "21. Branch offices. No association shall hereafter establish or maintain a branch office, except, that any association into which another association has been merged or which has acquired, by purchase, reorganization, or in any other manner, all or a substantial portion of the assets of another association, may, with the permission of the commissioner, and under such terms and conditions as he may prescribe, maintain the office previously maintained by such other association, or a suitable substitute therefor, as a branch office; provided, however, that the commissioner shall first determine that the maintenance of such branch is in the public interest and will be of benefit to the area served by such branch and to the members of the association."

Hence, if the Kearny Federal Savings and Loan Association were state chartered it could not obtain the branch in question unless it was the result of a merger with or a bulk sale from another state association. The action of the Home Loan Bank Board in deliberately ignoring such a definitive state law and policy, aside from its illegality, is also disruptive in its effects on a most important segment of our state and national financial structure.

It seems to us that the legislature of New Jersey is in much better position to properly evaluate the needs of its citizens in matters of this kind than is a board or body of the federal government, no matter how capably and honestly that board or body may administer its affairs. If a change in branch policy be necessary in the public interest, then it should, in our opinion, be initiated either by the state legislature, or by a definite statutory declaration on

the subject by the Congress of the United States as affecting its creatures, the federal savings and loan associations, doing business in New Jersey and elsewhere.

As the situation now stands, the Home Loan Bank Board has arrogated to itself the full and free power to grant branch privileges to a federal savings and loan association at any place in New Jersey it desires to establish one, on an application to it by any federal savings and loan association operating in the United States. On the other hand, the Commissioner of Banking and Insurance of the State of New Jersey is without such power and is quite properly bound by the mandate of his state legislature on the subject. So also is the Commissioner bound by statutes on branches as affecting savings banks and commercial banks under his supervision. His powers in regard to those institutions, it is true, are broader than as to savings and loan associations, but they are not, in any degree, the broad unlimited authority which the Home Loan Bank Board has assumed in New Jersey and elsewhere in the United States for federal savings and loan associations in connection with branch applications.

POINT IV.

The Court below erred in its interpretation of the Statute.

The Court below reached the conclusion that the basic statute, the Home Owners' Loan Act of 1933 (12 U. S. C. A. 1461 et seq.), while not giving explicit authority to the Home Loan Bank Board to permit branch offices for federally chartered savings and loan associations, does, however, carry sufficient implications by words and phrases to warrant the assumption that implied authority exists therein for that Board to rule or regulate on that subject.

It is significant to note that the Court specifically states that "it may be granted that a microscopic examination of the statutory words alone does not bring one to any conclusion not open to reasonable differences of opinion." Then the Court decides in favor of the existence of such power rather than against it, pointing out that section 1464(a) of the Home Owners' Loan Act of 1933, (supra),

authorizes the Board to issue federal charters after "giving primary consideration to the best practices of local mutual thrift and home financing institutions in the United States." The Court further states that the Board "is supposed to find out what the practices of these institutions are and give primary consideration to the best ones."

The Court then, and we believe erroneously, concludes that the right of the Board to make policy regulations relative to the primary charter also includes the establishment of branches.

In this connection the Court pointed out that the State of New Jersey is one of six states that, by statute, prohibit the establishment of branch offices by building and loan associations. The footnote to that statement in the Court's opinion states that "Since 1946 state building and loan associations in New Jersey may not establish branches except by acquisition of or merger with an existing association. N. J. L. 1946, c. 56, p. 139 § 21, 17 N. J. S. A. 12AA-21 (1950)."

It must be pointed out that branch offices were restricted in New Jersey by statutes which go back beyond 1946. *See N. J. R. S.* 17:12-6, *P. L.* 1925, *c.* 65, § 17, *p.* 196, *as amended by P. L.* 1932, *c.* 94 § 1, *p.* 164, *as amended by P. L.* 1942, *c.* 163 § 1, *p.* 473. The 1946 statute was a complete revision of the New Jersey Savings and Loan statutes. The branch office law in New Jersey, as will be noted by these statutory citations, is one which was well considered by the legislature of New Jersey.

It is to be noted that the Court below stated that "Congress put the duty upon the Board to decide what was the best practice and to give consideration to it," and, in reaching its conclusion, the Board also has the right to authorize branches "by the very terms of the Congressional enactment." It is extremely difficult to follow the Court's reason or its logic in this regard. We can read no such intendment into the statutory wording.

Surely the Court below could not have considered the past history of building and loan associations in New Jersey or the position of the State of New Jersey in this

branch controversy. The State of New Jersey is not, and never has been, against branch offices per se. The Court below ignored completely, however, the New Jersey State policy and the fact that New Jersey in past years had been greatly over chartered with the type of institution now under consideration. New Jersey still has over four hundred and fifty state chartered associations operating within its borders after having witnessed and supervised the demise of over one thousand of such associations in the state during the past fifteen years. (Records of Department of Banking and Insurance of the State of New Jersey.) Only three states in the United States still have a greater number of savings and loan associations.

It can readily be seen from these facts and figures that the State of New Jersey had and has a definite policy and program in regard to savings and loan associations operating under its charters and control. And that policy is not unknown to this Court. In the case of *Veix* vs. *Sixth Ward Building and Loan Association of Newark,* 310 U. S. 32 (1939), Justice Reed speaking for the Court, at page 37, had the following to say specifically on the question of withdrawals but generally on the subject of New Jersey law and policy:

> "The New Jersey statutes concerning the regulation of building and loan associations reach back many years prior to the purchase of these shares. Beginning in 1903 general regulatory acts were passed at intervals with sections directed to the mode of withdrawal (cases and statute law cited) * * *. While the Act of 1932 now under review was not emergency legislation the dangers of unrestricted withdrawals then became apparent. It was passed in the public interest to protect the activities of the associations for the economic welfare of the State. It is also plain that the 1932 Act was one of a long series regulating the many integrated phases of the building and loan business such as formation, membership, powers, investments, reports, liquidations, foreign associations and

examinations. We are dealing here with financial institutions of major importance to the credit system of the state (citing cases, etc.)."

See also *Bucsi* vs. *Longworth Building and Loan Association* (*E. & A.* 1937), 119 *N. J. L.* 120 (cited by Justice Reed in the above case) where Chancellor Campbell, speaking for our then Court of last resort, says:

> "This state has strictly regulated building and loan associations under a well defined public policy and the state has a right so to do. *Hopkins Federal Savings and Loan Association* vs. *Cleary,* 296 U. S. 315; 80 L. Ed. 251; 56 Sup. Ct. 235."

But of what avail the public policy of New Jersey if by the wholly uncontrolled non-legislative act of a federal administrative board, based upon implied rather than expressed statute law, the whole New Jersey State pattern, including as it does the important subject of branches, is not considered but is, in fact, discarded.

It is difficult to assume that when Congress cautioned the Board in Section 1464(a), (supra), to give "primary consideration to the best practices of local mutual thrift and home financing institutions in the United States," it intended that the Board should disregard the public policy of a sovereign state such as New Jersey and to set at naught a course of conduct in regard to such institutions worked out over the years by that State's executive, legislative and judicial branches, and cited by this Court in *Veix* vs. *Sixth Ward Building and Loan Association,* (supra), and to give free and unfettered power to an administrative tribunal to establish a branch wherever and whenever it so desires. We think such an assumption to be unrealistic and illogical.

Certainly adequate standards for the exercise of such unlimited administrative action seem to be clearly indicated. The pertinent federal statutes are presently barren of such standards.

We believe that our courts should not lend themselves to the encouragement of vague implications to be read into statutes rather than to call for definitive expression from the legislative halls of Congress, especially when, as here, the Court below finds a statute the wording of which leaves it of such uncertain mind that it states "a microscopic examination of the statutory words alone does not bring one to any conclusion not open to reasonable differences of opinion." In our opinion, Congressional rather than Judicial clarification, seems imperative.

POINT V.

The Court below misconstrued pertinent Congressional action.

We are in entire agreement with the Court below on its statement that "An administrative body cannot by its interpretation of the statute under which it operates increase its power beyond that given by the legislative body.", and the cases cited by the Court, no doubt, lend support to its further statement that "a contemporaneous interpretation of the authorized administrative agency is of weight in determining what the powers are."

But we must take decided issue in its wholly unwarranted use of two bills which were introduced in the 81st Congress (H. R. 4710 and S. 2006), providing for limitations upon the power of the Board with respect to the establishment of branch offices, to bolster or emphasize the weight to be given the Board's interpretation of a clouded statute purporting to bestow branch authority. Neither bill passed, as the Court below pointed out.

H. R. 4710 and S. 2006 were prepared by and introduced into the Congress of the United States in 1949, at the request of the National Association of Supervisors of State Banks and the National Association of State Savings, Building and Loan Supervisors (See Report of Proceedings of 10th Annual Convention of National Association of State Savings, Building and Loan Supervisors—address of President Leete, page 7—held at Madison, Wisconsin, November, 1949.) in order to secure immediate relief from

what was considered, and is still considered, an unwarranted assumption of power by the Home Loan Bank Board in issuing branch powers to federal savings and loan associations located in various states throughout the country, including New Jersey.

Surely there appears to be no legal justification for the Court's curious statement that their introduction "would have been wholly unnecessary to provide for limitations on the power of the Board to provide for branch offices if it had no such power at all" and that "the bills and report is stronger argument for its existence than the mere failure of Congress to do anything about an administrative body's interpretation of its authority when the matter is not directly called to its attention."

It seems to us to be poor law and logic that the very bills which were introduced to remedy what was conceived to be a grievous violation of State Rights should be used by any Court to justify or fortify an administrative agency's unwarranted assumption of power. The irony of such a conclusion to the States which sought and obtained the introduction of such legislation is too apparent to be further enlarged upon.

POINT VI.

The opinion of the Court below is in conflict with applicable decision of this Court.

The Court below goes into quite a lengthy dissertation on the lack of analogy between the limitations of the powers of national banks as compared to savings and loan associations, and reaches what we believe to be an erroneous conclusion that the case of *First National Bank of St. Louis* vs. *Missouri*, 263 U. S. 640 (1924) has no point or bearing on the question before it.

It is, of course, our contention that this case is legally dispositive of the question which is now before this Court, and that the reasons therein cited by this Court in that case apply with equal force and merit to the present branch matter.

It was contended in that case that the establishment of a branch bank was the exercise of an incidental power conferred by federal statute law to national banks. Justice Sutherland, speaking for the Court in that case very properly, in our opinion, stated that "the mere multiplication of places where the powers of a bank may be exercised is not, in our opinion, a necessary incident of a banking business, within the meaning of the law in question."

So also do we contend that the mere multiplication of places where the powers of a savings and loan or building and loan association may be exercised is not a necessary incident of the savings and loan or building and loan business within the intendment of the Home Owners' Loan Act of 1933, (supra), either expressed or implied. If branches had been intended or contemplated, Congress could have given the Board the right to rule or regulate in regard to them in subdivision (d) of section 5 of the Home Owners' Loan Act (above) where it gave the Board the right to so rule and regulate in regard to "the reorganization, consolidation, merger or liquidation of such associations, • • • •."

We must also point out that it is our opinion that the Court below had an erroneous conception of the historical background of building and loan associations generally and especially of the activities of modern savings and loan associations. The Court states that "savings and loan associations do some of the same things which banks do, obviously. But they do not do a general banking business."

Attention is directed, however, to the language of this Court in *Fahey* vs. *Mallonee,* 332 U. S. 245 (1947). In that case, the provisions of the Home Owners' Loan Act of 1933, (supra), for the appointment of conservators was attacked as too broad a delegation of power. In deciding the case contrary to that contention, this Court (on page 250) used the following language which, in our opinion, places these institutions well in the general category of banking institutions:

> "They do not deal with unprecedented economic problems of varied industries. They deal with a single

type of enterprise and with the problems of insecurity and mismanagement which are as old as banking enterprise. The remedies which are authorized are not new ones unknown to existing law to be invented by the Board in exercise of a lawless range of power. Banking is one of the longest regulated and most closely supervised of public callings. It is one in which accumulated experience of supervisors, acting for many states under various statutes, has established well defined practices for the appointment of conservators, receivers and liquidators."

And on page 256:

> "It would be intolerable that the Congress should endow an association with the right to conduct a public banking business on certain limitations, * * * ."

It seems clear to us, therefore, that the Court has placed savings and loan associations in the same general category as banks.

POINT VII.

The opinion of the Court below expressed an erroneous conception of the modern savings and loan association.

The Court below in referring to the operations of savings and loan associations, said:

> "There is no danger of any single association becoming a giant monopoly."

That statement may or may not be true. However, it is a conclusion which we contend is not based upon sufficient factual data or study. We pause only to point out that if some check is not put on the present assumed power of the Board to grant branch privileges regardless of Municipal, County or State lines, such a monopoly is a possibility, if not a probability. The Board has already crossed County lines, and, in one instance at least, it has also crossed State lines. (See records of Home Loan Bank Board.)

The Court below also said:

"Its investment area is limited."

To a degree, this may be true. There is provision in section 5(c) of the Home Owners' Loan Act of 1933, (supra), which restricts federal savings and loan associations in making mortgage loans to a fifty mile area of its home office with certain exceptions. One such exception allows mortgage loans outside the fifty mile limit in dollar amount not to exceed 15% of assets. This, of course, could be a considerable sum in a large association. See also section 163.9 of the Rules and Regulations for Insurance of Accounts issued under Chapter 1 (D), Title 24, Code of Federal Regulations, which permits exceptions to the fifty mile lending area, in some cases, with approval of the Home Loan Bank Board.

The Court below also said:

"Business with this type of institution is done, as far as payments to it are concerned, in small amounts and at frequent intervals."

This statement by the Court might very well apply to many building and loan associations throughout the country. Certainly, it does apply to many in New Jersey which still operate under the serial plan. However, it does not apply generally to the new type savings and loan association, whether federally chartered or state chartered with insured accounts. Accounts in these associations are now insured up to $10,000. There are over 100 insured State chartered associations in New Jersey, each with assets of over $1,000,000. One such association has assets of over $75,000,000. There are over 200 associations, State and Federal throughout the United tSates, each with assets ranging from $14,900,000 up to $115,500,000. (*See Report of Federal Savings and Loan Insurance Corporation, Washington, D. C., issued March* 8, 1951.)

It can be stated safely that the operations of these institutions are conducted in a manner not unlike a banking house or a savings bank. Much investment money, and in sums up to $10,000, is paid into and retained in these associations. (*See Records of Department of Banking and Insurance of New Jersey and Home Loan Bank Board, Washington, D. C.*)

CONCLUSION.

For the foregoing reasons the petition for a writ of certiorari in this cause should be granted.

Respectfully submitted,

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